

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

NORTH AMERICAN DREDGING
COMPANY OF NEVADA, a Cor-
poration, and CITY OF RICH-
MOND, a Municipal Corporation,
Appellants,

vs.

LUCIO M. MINTZER and MAU-
RICIA T. MINTZER, as Executor
and Executrix of the Last Will and
Testament of WILLIAM MINTZ-
ER, Deceased,

Appellees.

BRIEF FOR APPELLANTS.

UPON APPEAL FROM THE SOUTHERN DIVISION OF THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA,
SECOND DIVISION.

Filed

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No. 2913

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GENERAL EXPLANATION.

This appeal is from a judgment rendered in the District Court of the United States for the Northern District of California, Second Division, in favor of the plaintiffs (appellees herein).

The nature of the action and the issues involved are so clearly set forth in the opinion directing

entry of decree in favor of Plaintiffs, commencing on page fifty-five of the Transcript of Record, that we quote therefrom as follows:

“This is a bill to enjoin the defendant from further proceeding to dredge out and deepen a certain waterway or channel traversing lands alleged to belong to the plaintiffs’ testator, and from carrying away the earth or soil therefrom, as constituting a wilful and malicious trespass and waste, and to recover damages for the waste and injury already done.

The answer of the defendant denies any ownership or right of any kind in the plaintiffs in the land involved, and sets up that the channel in question is ‘known and designated as the South Channel of the San Pablo Canal, all within the city limits of the City of Richmond, County of Contra Costa, State of California, and that said channel is and has been for many years last past, a navigable waterway, with a public terminus, connecting the said city of Richmond with the San Pablo Bay and the bay of San Francisco’; and that ‘for many years last past vessels engaged in commerce have navigated and traversed said channel’; that all the acts done and committed by defendant of which complaint is made have been had and done under and in pursuance of a contract theretofore entered into between defendant and said city of Richmond whereby ‘defendant agreed to dredge a channel eighty (80) feet wide, in and through said south channel of said San Pablo Canal, to a uniform depth of

eight (8) feet below low tide,' and that the work of dredging said channel was being done by defendant 'for the purpose of improving said waterway in the interest of commerce and navigation,' etc. It denies that plaintiffs have suffered any damage or that defendant 'has committed any wilful or malicious or any trespass upon any property of plaintiffs.' It then alleges, as ground of affirmative relief, that after defendant had removed approximately 22,000 cubic yards of material from said channel it was stopped by the injunction issued herein and has since discontinued work under said contract, and that by reason of such interruption and delay in its work defendant has suffered damages on its part for which it asks judgment against the plaintiffs.

The city of Richmond was permitted to file a bill of intervention in which it alleges that the channel in question is a natural arm of San Pablo Bay, which is a navigable body of water within the State; 'that the depth of water in said channel varies with the rise and fall of the tide, and that at ordinary low tide said channel has a minimum depth of two (2) feet, and at ordinary high tide has a minimum depth of eight (8) feet'; and after alleging substantially in the terms set up in the answer the navigation of said channel during recent years between other points and the city of Richmond, it is alleged that in order to improve the navigability of the channel and render it more suitable for commerce 'it became and is necessary to deepen said channel throughout its entire length and to a width

of eighty (80) feet, to a depth of eight (8) feet at ordinary low tide.' It is alleged 'that the city of Richmond has a population of 20,000 or upwards, and contains within its limits a large number of extensive manufacturing plants and industries; that it is essential for the best interests of the city of Richmond, its inhabitants and the public generally, that the navigability of said channel be improved and increased as aforesaid, thereby affording better transportation facilities for the city of Richmond, its inhabitants and the public generally.' It admits the entering into the contract as set up by defendant for the deepening and widening of the channel, and alleges that it has procured for that purpose a permit from the War Department of the United States for such improvement. It denies any right or title in plaintiffs in or to the premises involved, or that any soil or other thing of value is being taken from plaintiff's property.

In response to the bill of intervention the plaintiffs filed an answer denying all its allegations as to the navigability or commercial value of said channel, and alleging that the intervenor and the Standard Oil Company of California have entered into a contract 'whereby it was agreed that the city of Richmond should cause the dirt or soil dredged or taken from the property of plaintiffs to be deposited upon the property of the Standard Oil Company of California, and that it should pay to the city of Richmond ten and 74/100 cents per cubic yard therefor, that being the exact price that the city of Richmond agreed to pay the defendant

herein, North American Dredging Company of Nevada for dredging said alleged channel as aforesaid, and that the aim and purpose of said agreement between the Standard Oil Company and the city of Richmond was that the Standard Oil Company should pay for said dredging, and thereby receive and obtain the property of plaintiffs without paying them therefor.' And it is alleged that if said channel is deepened in accordance with the contract between the intervenor and the defendant 'it will enable the Standard Oil Company of California to obtain a waterway to the San Pablo Bay over and across and upon the land and property of plaintiffs.' "

STATEMENT OF THE EVIDENCE.

The channel in question, referred to in the pleadings as the "South Channel of the San Pablo Canal" is referred to and designated in the evidence and the exhibits introduced as Channel "C." This channel is entirely within the corporate limits of the City of Richmond. (Tr. page 101).

This channel extends from San Pablo Creek (or Canal) through appellees' land and beyond the property of the Richmond Belt Line Railroad to the property of the Standard Oil Company. (Tr. page 76).

This channel terminates at the San Pablo Canal, which canal extends to San Pablo Bay. (Tr. pages 85 and 86).

It varies in width from one hundred (100) feet to two hundred (200) feet. (Tr. page 86).

The lands of the appellees, through which Channel C extends comprise about six hundred and eighty-seven (687) acres of swamp and overflowed lands, salt marsh and tide lands. (Tr. page 18).

Before any dredging was done in Channel "C", it had a depth of water at low tide varying from four (4) feet in the shallowest place, at the Standard Oil levy, to sixteen (16) feet at the entrance of the mouth of the channel. Midway of the channel between the Standard Oil refinery and the mouth of the channel there was in the neighborhood of about eight (8) feet of water at low tide. (Tr. pages 92 and 93). These figures are also verified by the Map in evidence marked defendants' Exhibit "M", which was made by the City Engineer of the City of Richmond, which shows the width, length and depth of the channel throughout.

On December 8, 1915, soundings taken at near flood tide, under the direction of Col. Thomas H. Rees, throughout the entire length of the channel, showed a variation of water in the channel from eleven (11) to sixteen (16) feet. The predicated tide in the tide tables for that tide was 6.8 feet. One sounding taken at a sharp point showed seven (7) feet of water, but this sounding was not shown to have been at the deepest portion of the channel. (Tr. p. 87).

An attempt was made about 1870 to construct a levee across Channel "C" and the San Pablo Canal (referred to in the proceedings in the trial Court as Channel "B"). The levee was a failure so far as Channel "B" was concerned. The levee could not restrain the water. The water was shut off completely in Channel "C" for one winter, the tide then took it out. (Tr. pages 77 and 78).

The evidence adduced as to the actual navigation of Channel "C" was as follows:

H. E. Aine testified that he had been familiar with Channel "C" and the lands through which it runs for the last twenty-six (26) or twenty-eight (28) years. (Tr. page 88). That the channel was navigated considerably with duck boats and flat boats. That in 1907, he piloted a launch which brought up through this channel several loads of piling which was delivered at the Standard Oil Company's property. That in 1914, he piloted up a barge and a gasoline launch and also the "Petroleum No. 3," a stern-wheeler. (Tr. page 89). That in 1914 the scow-schooner "Ada McKewen" brought a load of rock through Channel "C" to a point where the channel connects with the Standard Oil property. The channel had not been dredged out prior to the time these boats went up. (Tr. page 91).

In 1915, the craft known as the "Shasta" brought in through Channel "C" a cargo of sixty (60) yards of crushed rock. (Tr. page 92).

The "Ada McKewen" is a power scow boat, drawing about five (5) feet of water when loaded. The "Petroleum No. 3" is a stern-wheeler. (Page 93).

Fred Klesow testified that he is a master mariner in the bay and river trade. That he was first on the land through which Channel "C" runs about 1882, 1883 and 1884. That he navigated these streams with a vessel named the "Lookout" with a cargo of about fifty (50) tons, having about four (4) feet nine (9) inches draft. (Tr. page 94). That in December, 1915, he navigated Channel "C" with the schooner "Shasta" bringing up about eighty-five (85) tons of rock for the Standard Oil Company. That he never went up Channel "C" in a big boat in 1882. (Tr. page 95).

Lewis Chamberlain testified that he is in the launch business and owns two boats. That he went up Channel "C" in a launch towing rock barges to the Standard Oil Bulkhead. That he made one trip before the dredger of appellant, North American Dredging Company, was in and one afterwards. The loaded barge drew five feet of water on both trips. On both trips the tide was about four feet six inches. That the barge in tow was about twenty-six (26) feet wide. That he passed the dredger on the second trip. That the dredger barge was about thirty (30) feet or more in width. That he had no difficulty in passing it. That he had no difficulty in navigating Channel "C" except at one point where there was a kind of bulkhead where a few boards were sticking up. (Tr. pages 95 and 96).

W. Lindsey testified that he had lived in the vicinity of Richmond for thirty-three (33) years and is familiar with Channel "C" and the lands through which it runs. (Tr. page 97). That he has sailed, fished and hunted over the bodies of water in this locality as far back as forty (40) years. That about eighteen (18) years ago in an effort to make a levee and dike across Channel "C", he and others towed a barge, loaded with piles and a pile driver, by means of a gasoline boat, up Channel "C". Because the levee broke, they navigated the channel again and made a second attempt to build dikes and levees across Channel "C". (Tr. page 98).

C. Anderson, the captain of the dredger with which defendant was dredging the channel, testified that he took the dredge, which is thirty (30) feet wide, seventy-four (74) feet long and draws about four and one-half ($4\frac{1}{2}$) feet of water, up Channel "C" with a launch to about four hundred (400) feet from the Standard Oil Company's dike. (Tr. page 104).

Thomas H. Rees testified that he resided in San Francisco and that he was Lieutenant-Colonel, Corps of Engineers of the U. S. Army, in charge of the Government Engineers' office in San Francisco, and that he was in local charge of the improvement of the waterways around San Francisco Bay, and that he issued permits for improvements or works in navigable waters by authority of the Secretary of War. That he had seen the body of water marked "South Channel San Pablo Canal" referred to as

Channel "C", and that he issued the permit, under the authority of the Secretary of War, to the City of Richmond to do the work of dredging in the South Channel of San Pablo Canal, designated on Plaintiffs' exhibit 10 as Channel "C", which said permit was marked defendants' Exhibit "E". (Tr. pages 85 and 105).

Thomas H. Rees also testified that on December 8, 1915, he navigated Channel "C" with a power boat "The Suisun," being a boat about eighty-six (86) feet long, having a beam about sixteen (16) feet and drawing about five (5) feet nine (9) inches to six (6) feet of water. He also testified: "We went up just before high tide. The tide was still rising or flooding when we came out of the stream. While we were in the dredged channel a photograph was taken of my vessel." (Tr. page 85). The photograph exhibited to Colonel Rees was identified by him and introduced in evidence and marked defendant's Exhibit "A."

Thomas H. Rees further testified "we came into San Pablo Bay, into the mouth of San Pablo Canal, and then into the south channel of San Pablo Canal. (Channel "C"). The south channel of San Pablo Canal (Channel "C") is varying in width, some places not over 100 feet wide between the marsh land on either side and other places perhaps 200 feet or more." (Tr. page 86). He also testified that he had soundings taken as he came in and as he went out. That in the channel, they ran generally eleven (11) to twelve (12) feet of water, some-

times up to fifteen (15) or sixteen (16). At one point there was a sounding of seventeen (17) feet of water.

Colonel Rees also testified that he observed the land on either side of Channel "C," and that so far as he could see the immediate banks were covered with water. The salt marsh on either side so far as he could see was about a-wash. The water was just covering it generally. The grass was sticking up above the water. Some little distance away, it was impossible to tell whether the ground was above water or whether it was only the grass. He could see no evidence of any obstructions or dikes. (Tr. page 86).

Colonel Rees further testified that this channel is shown on the regular maps of the Coast and Geodetic Survey, but that the maps do not indicate whether or not it is navigable. (Tr. page 87).

Colonel Rees also testified that before issuing the permit hereinbefore referred to, which permit was signed by him on July 21, 1914, he received information from the City of Richmond concerning the navigability of the channel, and had been furnished with a description of the channel, and with a photograph showing a boat in the channel and at the head of the channel by the City Attorney of the City of Richmond. (Tr. page 88).

H. E. Aine testified: "Channel 'C' connects with the Standard Oil channel and runs to the main land.

The Standard Oil channel is a dredged channel going up to the Belt Line and it ends on a city street that comes behind the Standard Oil plant. By the Belt Line I mean the Richmond Belt Line Railway which begins at the Standard Oil Refinery and runs to Winehaven. It connects with both the Southern Pacific and the Santa Fe. It runs past the Standard Oil property around to Winehaven. This dredged channel connecting with Channel 'C' ends about 100 feet from the Richmond Belt Line Railway. The Richmond Belt Line Railway appears in that picture (Defendant's Exhibit 'C') in the foreground. This picture was taken on the 8th of December, the day of the visit of Colonel Rees. It correctly represents the condition of the land as to being covered with water at that time. I recognize the picture marked Defendant's Exhibit 'B.' I saw the picture taken. I observed the conditions in relation to the channel and the land there generally. The picture marked Plaintiffs' Exhibit 'D' is a correct representation of the condition existing at the time when Colonel Rees' boat came in there. I locate channel "C" on this picture. (Witness refers to Defendant's Exhibit 'D'). The channel shows very plainly in the picture. There is a boat in the channel." (Tr. page 91). "This dredged channel terminates near the asphalt department of the Standard Oil plant. Asphalt is handled in barrels, mostly over the Belt Line at this time. This channel 'C' could be used for any commercial purposes there." (Tr. page 93). "The Standard Oil plant was started in 1901." (Tr. page 93).

The City of Richmond was incorporated in 1905.
(Tr. page 79).

SPECIFICATION OF ERRORS.

The following assignment of errors by the trial Court are relied upon:

I.

In adjudging and decreeing that defendant and intervenor and their officers, agents, servants, employees and attorneys be enjoined from cutting, dredging or excavating any ditch or canal, or carrying away the dirt or soil upon the property of the plaintiffs and described in the Amended Bill of Complaint of plaintiffs herein.

II.

In ordering that an accounting of the loss and damage suffered by plaintiffs by reason of the acts of defendant and intervenor be referred to the Master in Chancery to hear testimony as to such loss and damage and to take an accounting thereof and to report the same together with his findings thereon to the Court.

III.

In adjudging that plaintiffs have and recover their costs and disbursements in this suit.

IV.

In overruling and not sustaining defendant's and

intervenor's objection to the admission in evidence of a certain agreement between the City of Richmond, intervenor, and the Standard Oil Company, a corporation, dated March 30, 1915, wherein the city of Richmond agrees for the consideration of \$.1074 a cubic yard to deposit all material dredged from the lands described in plaintiffs' Amended Bill on the lands of the Standard Oil Company.

V.

In sustaining and not overruling plaintiffs' objection to the following question asked by defendant and intervenor to defendant's and intervenor's witness, *H. E. Aine*, as follows: Question: Are there any other bulkheads constructed where that dredging material could be placed so that it could not run back into the channel? Said objection being sustained upon the ground that the question was immaterial, irrelevant and incompetent, and to which question said witness would have testified that the bulkhead upon the property of the Standard Oil Company was the only bulkhead behind which said dredging material could be placed.

ARGUMENT.

THE TRIAL COURT SHOULD NOT HAVE ENJOINED THE DREDGING OF THE CHANNEL BECAUSE IT IS A NAVIGABLE WATERWAY. The channel in question is navigable. Navigability in fact is the general test by which the navigability of waters is determined.

If they are navigable as a matter of fact, they are deemed navigable waters. If a stream is navigable in fact, it is navigable in law.

Kamm vs. Normand, 126 Am. State Rep. 698. See also—exhaustive note on subject “What Waters are Navigable” 126 Am. State Rep. 710-733.

“The capability of use by the public for purposes of transportation or commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact and becomes by law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal-power, by the wind, or by the use of steam, may be the instruments of such commerce, although in order to give it the character of a navigable stream it must be generally and actually useful for some purpose of trade or agriculture.”

United States vs. The Montello, 20 Wall 430.

In the case of the *City of Oakland vs. Oakland Water Front Company*, 118 Cal. 160 (180-2), the Court in referring to a branch of the stream, called San Antonio Creek, being a portion of the Oakland Estuary, says:

“Each branch had a depth of 2 ft. at low-tide—the same as the depth on the bar at the mouth of the Estuary, which meant a depth at full high-tide of from seven to eight feet every twenty-four hours, and this was sufficient to accommodate a very important traffic.”

And under this state of facts, the Court held that the branch of the Estuary above referred to was a navigable body of water.

The facts in the case at bar show a more favorable condition of navigability than those existing in the Oakland Water Front case.

A channel in a tide-river, which at half-tide is navigable for rowboats, is a navigable channel, although at low-tide there is not much water therein.

Judson vs. Tidewater Lumber Co., 98 Pac. 377.

A slough emptying into the sea at and during the ebb and flow of the tide, navigable for scows and for rafting and booming of logs, is a navigable stream.

Dawson vs. McMillan, 75 Pac. 807.

The navigability of a stream does not depend upon the extent or the manner of the use made of it, but whether or not it is capable of being used for purposes of trade and travel in the usual and ordinary modes.

State vs. Eason, 114 North Carolina, 787; 19 SE. 88.

The Daniel Ball, 10 Wall 557.

The Montello, 11 Wall. 411; 20 Wall. 430.

“The true test in determining the right of the public in the use of a stream is whether or

not inherently and in its nature it is capable of being used for floatage. If it is, an easement in favor of the public exists, whether it has been used by the public or not."

Kinney on Irrigation and Water Rights, 568.

Moore vs. Sanborn, 59 Am. Dec. 209.

Brown vs. Chadbourne, 50 Am. Dec. 641.

Willow River Co. vs. Wade, 42 L. R. A., 305.

The character of navigability is not so much determined by the frequency of its use for navigation as it is by its capacity of being used for purposes of transportation and commerce. Capacity for transportation and not the extent of the use for transportation is the criterion. The waters need not be in actual use if capable of the use.

St. Louis Railway Co. vs. Ramsey, 53 Ark. 314.

Sullivan vs. Spottswood, 82 Ala. 163.

Commonwealth vs. Inhabitants of Charlestown, 1 Pick. 180.

Nor does the fact that a floatable stream is not used by the public generally, but only by persons having a particular occupation, deprive it of its public character, if it has the capacity for useful navigation.

"In order for a stream to be determined navigable it is not necessary for it to be capable of navigation continuously throughout all the seasons, if it is so capable during a material portion of the year. It is the valuable, and not the continued use which is the important element to navigability."

Bucki vs. Cone, 25 Fla. 1, 6 So. 160.

“The navigability of a stream is shown where it appears that for a great many years previously boats navigated it at certain seasons of the year, when there is no evidence that its condition has changed.”

Miller & Lux vs. Enterprise Canal Co., 142 Cal. 208.

The facts of the case at bar show that channel “C” is in fact navigable throughout its entire length from the San Pablo Canal to the property of the Standard Oil Company. Between the property claimed by the plaintiffs and the property of the Standard Oil Company is the property of the Richmond Belt Line Railway Company, a railway corporation which is a public carrier and a public service corporation. The contention of the plaintiffs that this channel is entirely surrounded by their land, or by land claimed by them, is not supported by the evidence, as the land of the Standard Oil Company, the Richmond Belt Line Railway, and the lands claimed by the plaintiffs are all adjacent to the natural banks of this channel. Shippers may have cargoes transported through this channel and transported to the cars of the Richmond Belt Line Railway without trespassing upon the private property of the Standard Oil Company, or upon the private property claimed by the plaintiffs. Even if this were not a fact, the navigability of the channel is not affected by the question whether one riparian owner has a monopoly of the surrounding land.

State vs. Twiford, 136 No. Carolina 603; 43 SE. 586.

If this were not the rule the question as to the navigability of water would depend upon whether or not riparian owners had monopolized the ownership of the adjacent soil.

In the case of *Chisolm vs. Caines*, 67 Fed. Rep 285, the Court, in considering the question of navigability of waters, discussed the essential characteristics of a navigable stream as follows:

“The crucial question in this case therefore is: are these creeks, or any of them . . . those which bound and those which permeate these marshes, . . . public navigable streams, or capable of becoming navigable streams; if they are, although they may have passed with the marshes which surround them, they are held subject to the uses of the public for passage and navigation.” . . .

“Nor does it (navigability) depend upon uninterrupted use, nor upon a channel free from obstruction, if this can be removed.”

- “Nor is it necessary that it shall at all times be passable . . . floatable.” . . .

“The essential characteristic of a navigable stream is that it is, or is capable of becoming, a public highway . . . a means open to the public of passing from one place where they have a right to be to another in which they have the same right.” . . .

“If a stream in itself, or in connection with others, forms a continuous connection in whole or in part between different places in different states, it is navigable water of the United

States; but if it lies wholly within a state and is only navigable between different places within a state, then it is not navigable waters of the United States, but only a navigable water of a state. This distinction simply determines the jurisdiction over it. The essential to navigability is the same in both, . . . a highway between places." (p. 292).

In *Attorney General vs. Woods*, 108 Mass. 436, 439, the Supreme Court made the test of navigability neither the size of the streams nor the character of the vessels on them, nor the motive of the public in using them, *but the fact that they were highways through which the public could pass for business or pleasure.*

According to the overwhelming weight of authority, the navigability of a stream or other body of water depends, not upon the use which has been made of the stream, but upon its capability of use in the furtherance of navigation and commerce.

Prior to 1901, this channel had been navigated by duck boats and flat boats, (Tr. page 89) according to the testimony of H. E. Aine. And on at least two occasions, in about the year 1900, the channel had been navigated with a gasoline launch towing a barge and pile driver, according to the testimony of W. Lindsey (Tr. page 98).

Prior to the location of the Standard Oil plant in 1901 and prior to the incorporation of the City of Richmond in 1905, there had been little occasion to make any extensive use of this waterway for

commercial purposes, but the testimony shows that it was capable of such use.

After the location of the Standard Oil plant and the incorporation of the City of Richmond, and the subsequent growth and development of said City, the use and necessity for use of this waterway has correspondingly increased.

According to the testimony of H. E. Aine a launch navigated this channel and towed several barge loads of piling through this channel which were delivered at the Standard Oil Company's property.

In 1914, several barges and gasoline launches navigated this channel. The "Petroleum No. 3," a sternwheeler also navigated this channel in 1914. The scow-schooner "Ada McKewen" navigated this channel and delivered a load of rock at the property of the Standard Oil Company in 1914. In 1915, the craft known as the "Shasta" navigated this channel with a cargo of eighty-five (85) tons of rock.

In 1915, Lewis Chamberlain navigated this channel on two occasions with a launch towing a barge loaded with rock, which barge drew five (5) feet of water.

In 1915, C. Anderson navigated the channel with a launch and towed the dredger of the defendant through the channel to about four hundred (400)

feet from the Standard Oil dike. This barge drew four and one-half ($4\frac{1}{2}$) feet of water.

Later Colonel Rees navigated this channel with the "Suisun," which vessel is eighty-six (86) feet in length and has a sixteen (16) foot beam and draws about five (5) feet nine (9) inches to six (6) feet of water.

On various other occasions, the channel or waterway has been navigated by other boats and vessels.

The evidence generally shows that for many years the stream has been navigated at will by the public desiring to use it, and there is no evidence showing that plaintiffs, or their predecessors in interest, ever attempted to prevent the public use of this stream as a navigable waterway.

According to the testimony of John H. Nicholl, who has been well acquainted and very familiar with channel "C" and the lands adjacent thereto since 1868, until the location of the Standard Oil plant and the growth and development of the City of Richmond in 1901, there had been little occasion to use this waterway for commercial purposes.

But according to the great weight of authority, even though the stream in question had never been used for useful purposes as a navigable waterway, yet the fact that it is capable of such use is sufficient to establish its status as a navigable waterway.

In the opinion of the learned trial Judge, it is stated that the mere depth of water will not place a stream in the category of a navigable waterway, other essentials being absent; nor, on the other hand, will the want of depth or capacity in part of its course take a stream out of that category if the other characteristics are present.

We assert that the evidence in this case shows that channel "C" has present every essential necessary to place it in the category of navigable waters as defined by the decisions of the various courts which have determined that question. It has the width of channel and depth of water necessary for the carriage of craft ordinarily used in local commerce. It has one terminus in an admittedly navigable arm of San Pablo Bay and the other on lands owned by a public utility, the Belt Line Railway Company. Its usefulness for commercial purposes has been demonstrated by the utilizing of its waters for the transportation of rock, gravel, piling, pile driver, barges and dredges. It is capable of continuous use for the carrying on of commerce between the City of Richmond and other ports.

The facts in this case bring it clearly within the requirements of a navigable waterway as prescribed in the case of *Rowe vs. The Granite Bridge Company*, 21 Pick. 344 referred to in the opinion of the Trial Judge, in which decision the following language is used:

“But in order to have this character (navigability) it must be navigable to some purpose, useful to trade or agriculture. It is not a mere possibility of being used under some circumstances, as at extraordinary high tides, which will give it the character of a navigable stream, but it must be generally and commonly useful to some purpose of trade or agriculture.”

Channel “C” measures up fully to these requirements. It is navigable to a purpose useful to trade. It has more than a mere possibility of being used, under some circumstances, at extraordinary high tides, it, in fact, being navigable at all ordinary tides for boats and barges drawing not more than four (4) feet of water, and at ordinary high tide for vessels drawing as much as ten (10) feet of water.

Channel “C” also meets the requirements cited by the Trial Judge in the case of *Harrison vs. Fite*, 148 Fed. 781, in which it is said:

“Mere depth of water without profitable utility, will not render a water course navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes. To be navigable a water course must have a useful capacity as a public highway of transportation.”

We submit that the evidence shows that the waterway in question is sufficient for more than pleasure boating or to enable hunters or fishermen to float their skiffs or canoes, and, in fact, has the capacity for, and has been used, as a pub-

lie highway of transportation by vessels engaged in commerce and carrying cargoes of gravel, sand, rock and other commodities.

The portions of the testimony cited show that the channel in its present state is navigable by vessels engaged in commerce, drawing from four (4) to ten (10) feet of water, and that the opinion of the trial Court, "that the conceded necessity of the work sought to be prosecuted is a recognition that the channel is not susceptible of being navigated in its present state without artificial aid" (Tr. page 69) is not borne out by the evidence. "Conceded necessity" is not a recognition that the channel is not susceptible of being navigated in its present state, but the work sought to be done is simply for the purpose of improving the navigability of the channel or waterway so that said channel will be navigable at all times for vessels, engaged in commerce, of deeper draft than vessels which can now navigate said channel. It is not unusual for the government or other public authorities to dredge waterways, which are concededly navigable without artificial aid, for the purpose of improving their navigability.

It does not at all impair the status of this channel as a navigable waterway that, if as suggested by the Trial Judge, it lies only at Richmond's "backdoor," (Tr. page 70) as commerce may as well be carried to the back door of a municipality as well as to its front door. In our humble opinion, we believe it is customary and generally

conceded that the water front of a City is its front door rather than its back door, especially so far as its commercial interests are concerned.

It is difficult to comprehend how this channel could be available to the Belt Line Railroad (Tr. page 70) without being of benefit to the general public, the Belt Line Railroad being a public carrier.

CHANNEL "C" BEING A NAVIGABLE WATERWAY WITHIN ITS TERRITORIAL LIMITS, THE CITY OF RICHMOND THEREFORE HAS THE AUTHORITY TO IMPROVE ITS NAVIGABILITY BY REMOVING THE SOIL IN THE BED OF THE CHANNEL UNDER SUCH NAVIGABLE WATERWAY.

The United States has power to make improvements to navigable waterways and channels.

Gibson vs. United States, 166 U. S. 269.

Cultivation Co. vs. Briggs, 229 U. S. 82.

Lumber Company vs. U. S., 204 Fed. 489.

The state has power to make improvements in navigable waterways, except in so far as it is prohibited by federal legislation.

St. Joseph Co. vs. Pidge, 5 Ind. 13.

McKeen vs. Delaware Canal Co., 49 Pa. State 424.

Lehigh Valley Ry. Co. vs. Canal Board, 130
N. Y. Suppl. 978.

*Corrigan Transit Co. vs. Chicago Sanitary
District*, 137 Fed. 851.

This power may be delegated by the state to a city.

Austin vs. Hall, 58 SW 479.

West Chicago Street Ry. Co. vs. People, 201
U. S. 506.

The Act admitting California to the Union was upon the condition "That all the navigable waters within said state shall be common highways and forever free to the inhabitants of said state as to the citizens of the United States, without any tax, impost or duty therefor."

Donnelly vs. U. S., 228 U. S. 243; 263.

The state has the right to control and regulate the public use of navigable water within its boundaries.

The People vs. Williams, 64 Cal. 498.

The municipality of Richmond through its charter has the right to improve the navigability of a navigable channel within its territorial limits.

"To control the bays, inlets and channels flowing through the city or adjoining the same, to widen, straighten and deepen the same where such work is necessary for the purposes of sanitation, drainage or removal of sewage;

to fill the same when they are obstructions to proposed streets or roads, to control and improve the water front of the city and to maintain embankments and other works necessary to protect the city from overflow; to construct and maintain wharves, chutes, piers and breakwaters within the limits of the city.”

Article 2, Section 10 of the Charter of the City of Richmond; Statutes 1909, page 1264.

See also Statutes 1913, page 605, as follows:

Section 1. There is hereby granted and conveyed to the city of Richmond in the county of Contra Costa, in the state of California, all the lands situate on the City of Richmond side of the bay of San Francisco and the bay of San Pablo, lying and being between the line of mean high tide and the line of mean low tide as the same has been or may be hereafter established between the prolongation into the bay of San Pablo of the north boundary line of the said city of Richmond and the prolongation into the bay of San Francisco of the southerly boundary line of the city of Richmond.

Sec. 2. The city of Richmond shall have and there is hereby granted to it the right to make upon said premises all improvements, betterments and structures of every kind and character, proper, needful and useful for the development of commerce, navigation and fishing, including the construction of all wharves, docks, piers, slips, and the construction and operation of a municipal belt line railroad in connection with said dock system.”

Permission and authority were obtained from the War Department of the United States to improve

this channel according to certain plans and specifications adopted therefor. The permit in evidence granted by the War Department of the United States, July 2, 1914, was obtained pursuant to the provisions of the Act of Congress.

Thirty Statutes at Large, 1151.

When public authorities see fit to make improvements on land below highwater mark for purposes of navigation riparian owner must yield thereto, and his right is subordinate to the public right.

People vs. Southern Pacific, 166 Cal. 627.

People vs. Russ, 132 Cal. 102.

Mashburn vs. St. Joe Imp. Co., 113 Pac. 92.

The public has the right to make use of a navigable stream as a natural highway and if a riparian owner is injured by such use he is without remedy.

Lewis Blue Point Oyster Cultivation Co. vs. Briggs, 198 N. Y. 287,

Champlain Stone and Sand Co. vs. State,
142 App. Div. 94.

An injunction against the improvement of navigable waters will not be granted where the work is authorized and the means adopted are not improper.

Waterloo Woolen Mfg. Co. vs. Shanahan,
128 N. Y. 345.

Schuyler Steamboat Line vs. Newton, 21 Fed.
Case No. 12496; 9 Rep. 233.

THE STATE HAS NO POWER TO
ALIENATE LANDS UNDERLYING ANY
NAVIGABLE STREAM OR BODY OF
WATER SO AS TO CUT OFF THE PUB-
LIC RIGHT OF NAVIGATION.

While it may be conceded that the lands described in the amended bill were subject to sale by the State of California as salt marsh lands, swamp and overflowed or tide lands, and the state lawfully issued a patent therefor, it is not conceded that such patent operated so as to cut off the public right of navigation upon and over any navigable waters within the limits of such grant, nor is it conceded that such title includes the soil underlying the channel itself to the extent that such soil may not be removed for the purpose of either maintaining or improving the navigability of the waters overlying such soil.

In the opinion of the Trial Judge and in the trial briefs of appellees', strong reliance is placed on the case of *Knudson vs. Kearney*, 171 Cal. 250, which decision it is asserted supports the contention that it is possible for the state to extend to any individual the power to deny to the public the right to enjoy or use navigable waters for the purposes of commerce. The *Knudson-Kearney* case, *supra*, was an action between two individuals in which neither the state nor any political subdivision was a party. The only matter there considered was the power of the State to dispose of the *jus privatum* without regard to the *jus publicum*, which a very long and

consistent line of authorities hold, under no circumstances, can be disposed of by the State.

In that case, the court, referring to its decision in the case of *People vs. California Fish Company*, 166 Cal. 576, says:

“We were careful to say that ‘when the plan or system of improvement or development adopted by the state for promotion of navigation and commerce cuts off a part of these tide-lands or submerged lands from the public channels, so that they are no longer useful for navigation, the state may thereupon sell and dispose of such excluded lands into private ownership or private uses, thereby destroying the public easement in such portion of the lands and giving them over to the grantee, free from public control and use.’ ”

The Court further says:

“It is obvious in the provisions of the afore-said Acts of 1868 and 1870, that they were enacted in aid of navigation and for the purpose of providing for the improvements of San Francisco Bay so as to make it more suitable for navigation.”

The testimony in the case at bar shows that the swamp and overflowed, salt marsh and tide-lands described in the Amended Bill have never been improved, and that Channel “C” has been and still remains a natural waterway actually navigated and commercially useful, and has never been cut off from the public channels, and has never been shown to be no longer useful for navigation, so that the state could sell the same into private ownership,

so as to permit the destruction of the public right of navigation thereon.

But, on the contrary, the evidence does show that instead of the channel in question being no longer useful for navigation, its usefulness for that purpose is constantly increasing with the growth and development of the commercial activities of the city of Richmond, within whose confines it is entirely situated.

The Act admitting the State of California into the Union provides:

“That all of the navigable waters within the said state shall be common highways and forever free as well to the inhabitants of said state as to the citizens of the United States without any tax, import or duty therefor.”

In face of such an emphatic and positive declaration by Congress, how can it be held that, if channel “C” was ever a navigable waterway, the City of Richmond, its inhabitants or the public generally, can now be denied the privilege of navigating such channel or be denied the privilege of navigating such channel for commercial purposes, without doing violence to the very Act by which the State of California was admitted into the Union?

In *Heckman vs. Swett*, 99 Cal. 303, it was said:

“Navigable streams and the shores to ordinary high-water mark are held by the state in trust for the public; but qualified rights therein may be granted so far as they are not incon-

sistent with or are in aid of the principal use, viz: for the purpose of navigation. In the absence of the Act of 1859, regulating fisheries on Eel River, the right to use the shore between high and low-water mark, for fishing purposes was common to the people of the State.”

This was an action to quiet title to a fishing privilege upon Eel River. Both parties claimed under swamp land patents issued by the State. Here the common law distinction between the *jus privatum* and *jus publicum* is clearly shown. The effect of the decision being that land of this character held by the State may be disposed of so far as the private trust or right is concerned but that the public right cannot be disposed of. This doctrine is perhaps more clearly enunciated in the case of *Oakland v. Oakland Water Front Co.*, 118 Cal. 160, in which case the court is called upon to construe the grant to Oakland of the tide lands between high tide and “ship-channel,” and the grant by Oakland to H. W. Carpentier.

In the opinion, written by Chief Justice Beatty, that eminent Jurist, commenting on the doctrine, enunciated in *Illinois Central Railroad v. Illinois*, 146 U. S. 387, says:

“The conclusion of the Court upon these points and the doctrine thereby established are conceded to be a necessary part of its decision, and not only do not dissent from them, I entirely approve them. Stated briefly, I understand the doctrine of that case to be that the several states hold and own the lands covered by navigable waters within their respective

boundaries in their sovereign capacity, and primarily for the purpose of preserving and improving the public rights of navigation and fishery. They have in them a double right a *jus publicum* and a *jus privatum*. The former pertains to their political power—their sovereign dominion, and cannot be irrevocably alienated or materially impaired. The latter is proprietary and the subject of private ownership, but it is alienable only in *strict subordination to the former*.”

“No grant of lands covered by navigable waters can be made which will impair the power of a subsequent legislature to regulate the enjoyment of the public right. The grantee takes the mere proprietary interest in the soil and holds it subject to the public easement, and, if his ownership of the soil stands in the way of public works necessary for the improvements of navigation and in aid of commerce, the grant may be revoked upon the tender of a fair compensation for such lawful improvements as may have been made by the grantee in pursuance of any express or implied license contained in the grant. But in perfect accord with this doctrine it was also held that the state might alienate irrevocably parcels of its submerged lands of reasonable extent for the erection of docks, piers and other aids to commerce. It was further conceded to be a proper exercise of the power of the state to establish harbor lines and to authorize the reclamation of mud flats and shoals, where that could be done without detriment to the public rights. The filling up of such lands, it was said, was often an improvement of navigation, and an advantage to commerce and navigation, and therefore lands susceptible of reclamation by that method may be alienated irrevocably. This in general terms is the doctrine of the Chicago case, and of the numerous decisions therein reviewed and com-

mented upon. It is also the doctrine which has been distinctly announced by our predecessors in the former Supreme Court of this State."

"The same doctrine is recognized in *Taylor vs. Underhill*, 40 Cal. 471, and was even more distinctly stated in *Eldridge v. Cowell*, 4 Cal. 80. There is no decision of this Court which conflicts in the slightest degree with the doctrine of these cases, each of which recognized the fact that the submerged lands of the state, though held and owned subject to a public trust, are nevertheless alienable in private ownership where capable of reclamation without detriment to the public right, and a fortiori where their reclamation will be of advantage to navigation and commerce."

In the case of *People v. Kerber*, 152 Cal. 731 the defendant had erected a wharf in the harbor of San Diego upon the land below high-water mark, belonging to the State. The Court says: (723)

"Tide lands of this character vest in and belong to the state by virtue of its sovereignty—And when such tide lands are situated in a navigable bay and constitute a part of the water front thereof, as is the case here, they constitute property devoted to public use, of which private persons cannot obtain title by prescription, founded upon adverse occupancy for the period prescribed by the Statute of Limitations. In *Ward v. Mulford*, 32 Cal., on page 372, the Court says on this subject: 'Such land is held in trust for the benefit of the people. The right of the state is subservient to the public rights of navigation and fishery, and theoretically, at least, the state can make no disposition of them prejudicial to the right of the public to use them for the purpose of navigation and fishery, and

whatever disposition she does make of them, her grantee takes them upon the same terms upon which she holds them, and, of course, subject to the public rights above mentioned. (See, also, *Oakland v. Oakland W. F. Co.*, 118 Cal., 182 (50 Pac. 277), page 184, where the same passage is quoted with approval. Property thus held by the State intrusted for public use cannot be gained by adverse possession, and the Statute of Limitations does not apply to an action by the State or its agents to recover such property from one who uses it for private purpose not consistent with the public use. This is the settled rule in this State with respect to all property so devoted to public use and tidelands, underlying waters forming part of the waters of a navigable bay used for navigation, are not, in this respect, to be distinguished from property used for other public purposes.”

It would seem to be a clearly settled fact that the common law doctrine as to the tenure of the State of its submerged lands, is the law of California.

“But this *soil* is held by the state, not only subject to but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shell fish as floating fish. . . . The state holds the property of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of fishery. In other words, it may forbid all such acts as would render the public right less valuable, or destroy it altogether. This legislative jurisdiction of the State over it, and, from its duty to preserve unimpaired these public uses for which the soil is held.”

Smith v. Maryland, 18 How. 71.

In the case of *Mumford v. Wardell*, 6 Wall. 423, the question was whether the Alcalde grant of a water lot in San Francisco carried title. The Court held that it did not, saying:

“Necessary conclusion is, that the ownership of the lot in question, when the State was admitted into the Union, became vested in the State as absolute owner, subject only to the paramount right of navigation.”

While the State in the administration of its trust over tidal lands may make such a conveyance as will convey the *jus privatum*, it has nowhere been held that it may by such conveyance take away the public right of navigation, and particularly in a case like the one at bar, where the lands conveyed by the state have remained unimproved, and such grant is shown not to be in aid of navigation, but on the contrary, is now operating so as to destroy the public right of navigation.

“It is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control of navigation upon them, and consequently, to the exclusion of private ownership of the waters or the soils under them.”

Packer v. Bird, 137 U. S. 661.

“Such title as to the shore and lands under water is regarded as incidental to the sovereignty of the state . . . a portion of the royalties belonging thereto and held in trust for the public purposes of navigation and fishery . . . and cannot be retained or granted out to individuals by the United States.”

Hardin v. Jordan, 140 U. S. 371.

The limitations upon the rights of the States to cut off the public right of navigation and fishery are clearly determined in the case of *Illinois Central Railroad v. Illinois*, 146 U. S. 387. In the opinion of the court rendered by Mr. Justice Field, it is said: (452)

“That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds title to soils under tide water, by the common law, we have already shown, and that the title necessarily carries with it control over the water above them whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open for pre-emption and sale. *It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over these, and have liberty of fishing therein freed from the obstruction or interference of private parties.* The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the state may grant parcels of the submerged lands; and so long as their disposition is made for such purpose, no valid objection can be made to the grants. It is grants of parcels of land under navigable waters that may afford foundation for wharves, piers, docks and other structures in aid of commerce and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases

as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state. But that is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. *Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purpose of the trust can never be lost except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.* It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, of which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested that the language of the adjudged cases can be reconciled. General language sometimes found in opinions of the Courts expressive of absolute ownership and control by the State of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. A grant of all the lands under the navigable water of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. *The state can no more abdicate its trust over property in which the*

whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties except in the instance of parcels mentioned for the improvement of the navigation and use of the waters or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special nature, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State."

This case is one in which the Government title, the *jus publicum* of the people, had been conveyed and the Court held that such a grant could not be legally made. This is the only ground upon which the decision is based.

The act there under discussion placed under the control of the railroad company, nearly all the submerged lands of the harbor, putting it in the power of the company to delay indefinitely the improvement of the harbor. It was therefore held that such a grant was an invasion of the governmental right of the State.

In the case at bar the governmental authorities had recognized the navigability of the channel in

question and had granted to the authorities of the City of Richmond the right to improve its navigability by dredging the bottom of the channel. The case of *Knudson v. Kearney*, 197 Cal. 250, so far as any language contained in that decision might be construed as holding that the tide land commissioners, created by an Act of the Legislature of the State of California, had the power and authority to determine that lands which are in fact navigable, may be sold into private ownership, must be construed with regard to the fact that the Court there had only in mind the disposal of the *jus privatum* of the state, and if it were intended by the decision to hold that, regardless of the facts of actual navigability or actual adaptability of a stream or body of water for useful commercial navigation, such decision is contrary to the principle established in the *Illinois Central Railway vs. Illinois*, *supra*, and the other decisions holding to the same effect.

“The simple truth of the matter is that the state, always, of course, subject to the paramount control of the general government touching matters of navigation and commerce, has the right to sell into private ownership any of these water covered lands, the limitations upon its power in this regard being that such sales shall be in aid of, or at least not in derogation of its governmental trust to preserve needed navigable waters for the benefit of its people.”

Bolsa Land Co. v. Burdick, 151 Cal. 254.

The doctrine of the common law is that the public has a right to the navigation of the waters of the

Country, and that the title of the state is subordinate to that public right. The title of the state is in this sense *public* and *governmental*, and constitutes the *jus publicum* of the common law. In this sense only does the state hold the land in "trust." It holds in trust for the benefit of commerce and navigation and in the interest of all of its citizens, and of the citizens of the United States. Its duty is to keep the navigable waterways free from obstruction and to improve them as far as possible, in the interest of commerce and navigation. In this regard, *and in this regard only*, the state holds the title to its submerged tide lands in trust for the public. It is a governmental function purely, and has nothing to do with the private proprietorship by the state of such lands.

The portions of the testimony which we have quoted from the transcript show conclusively that channel "C" is a navigable waterway. That it has been navigated for years by vessels engaged in commerce, and that vessels engaged in commerce drawing from four feet to ten feet of water can navigate this waterway. That since the growth and development of the City of Richmond, the necessity for the use of this waterway for purposes of commerce and navigation have greatly increased, and that it is capable of an extensive and valuable use as a waterway for commerce and navigation. In view of the authorities cited, we contend that all the essential requisites are present and that by every test which has been approved by a Court, this waterway is navigable in law as well as in fact. In

view of the authorities cited, which are only a few of the numerous cases on the question, we do not think the right of the City of Richmond to improve the navigability of this waterway can be seriously questioned, or can be cut off by an attempted disposal of the private rights of the state. From the facts adduced and the law applicable thereto, the trial court erred in adjudging and decreeing that the defendant and intervenor and their officers, agents, servants, employees and attorneys be enjoined from cutting, dredging or excavating any ditch or canal, or carrying away the dirt or soil upon the property of the plaintiffs and described in the Amended Bill of Complaint of plaintiffs herein. (Assignment of Error No. I.)

The trial Court erred in ordering that an accounting of the loss and damage suffered by plaintiffs by reason of the acts of defendant and intervenor be referred to the Master in Chancery to hear testimony as to such loss and damage and to take an account thereof and to report the same together with his findings thereon to the Court. (Assignment of Error No. II.)

If our contention is correct that this is a navigable waterway, and we believe the testimony and the law show our contention in this regard to be sound, and that the waterway is navigable in fact and in law, and if our contention is correct, as we have hereinbefore pointed out, that the City of Richmond has the authority to improve the navigability of a navigable waterway within its territorial

limits, by dredging and deepening the bed of the channel under such water, then, it must necessarily follow that the Court also erred in ordering an account and in referring the matter to the Master in Chancery to hear testimony as to such loss and damage and to report his findings thereon to the Court. If the waterway is navigable as we contend, and if the city has the authority to improve its navigability, the Trial Court should not have enjoined the dredging, and no loss or damage has been suffered by the plaintiffs.

The Court erred in adjudging that plaintiffs have and recover their costs and disbursements in this suit. (Assignment of Error No. III.) If our contentions are correct concerning the specification of errors Nos. I and II, then it necessarily follows that the Court erred in adjudging that plaintiffs have and recover their costs and disbursements in this suit.

The Court erred in overruling and not sustaining defendant's and intervenor's objection to the admission in evidence of a certain agreement between the city of Richmond, intervenor and the Standard Oil Company, a corporation, dated March 30, 1915, wherein the city of Richmond agrees for the consideration of \$.1074 a cubic yard to deposit all material dredged from the lands described in plaintiffs' Amended Bill on the lands of the Standard Oil Company. (Assignment of Error No. IV.)

The record in this particular is as follows:

“*A. C. Faris*, being first duly sworn as a witness on behalf of plaintiffs, testified as follows:

I am city clerk of the city of Richmond. I have brought with me an agreement entered into by the city of Richmond and the Standard Oil Company sometime in April of last year, requiring the dumping of the dredgings of the south branch of the San Pablo levee or channel upon the land of the Standard Oil Company. That document is on record in the files of my office.

MR. JOHNSON—I now offer this agreement in evidence; it is dated the 30th of March, 1915, between the Standard Oil Company and the city of Richmond.

The Court—Very well, let it go in.

MR. WHITE. I object upon the ground that it is immaterial, irrelevant and incompetent. It does not tend to prove any issues in this case; is not a contract binding on this defendant. Defendant is not a party to it; is in no wise bound by it.

(After discussion.)

THE COURT—That only bears upon the question of its navigability—whether it is a navigable stream or not. Whether it has ever been recorded or treated as such. I do not see any harm to this. Let the matter go in.

(Contract introduced in evidence. Marked Plaintiff's Exhibit C.)

Mr. WHITE—Exception.

In order to improve the navigability of this waterway, it was necessary, first, to obtain a permit from the Secretary of War of the United States. (Defendant's exhibit "E"). The conditions upon which this permit, and permits generally are granted are that any materials dredged from the bed of a navigable waterway must be deposited behind suitable bulkheads for retaining same to prevent the material from returning into the navigable waterway.

While apparently the Court admitted the contract between the city of Richmond and the Standard Oil Company as having a bearing upon the question of whether or not Channel "C" is a navigable waterway (Tr. page 83), yet the Court's opinion shows that it served no useful purpose in the mind of the Court and did not aid in determining this question, but served as a basis for an opinion by the Court that the dredging done, and to be done, under the contract constituted the taking of the soil of the plaintiffs and depositing it on the land of the Standard Oil Company for the betterment of the latter. It is thus apparent that it was an error of the Trial Court, prejudicial to the appellants, to admit in evidence this contract which did not, and could not, in any way tend to prove whether or not the waterway was navigable, but which did form the basis for the conclusion of the Court that the soil of plaintiffs was being taken and deposited on the land of the Standard Oil Company for the betterment of the latter.

The permit issued by the Secretary of War of the United States (defendant's Exhibit "E") required that the material dredged from the channel of the navigable waterway should be placed behind bulkheads suitable for retaining the same. The soil could not, under the terms of the permit be allowed to be wasted in the channel, nor could it be deposited on plaintiffs' riparian land without their consent, and it is immaterial, so far as any of the issues in this case are concerned, as to where the waste materials were deposited, or upon whose land they were deposited so long as the terms and conditions of the permit were complied with, and no rights of the plaintiffs were violated. But, even if it were true that the contract in question did result in material benefit to the Standard Oil Company, it does not necessarily, or at all, follow that the dredging, which the City had the legal right to do, could be enjoined because any corporation, or individual, was to incidentally be benefitted thereby.

The Court erred in sustaining and not overruling plaintiffs' objection to the following question asked by defendant and intervenor to defendant's and intervenor's witness, H. E. Aine, as follows: Question: Are there any other bulkheads constructed where that dredging material could be placed so that it could not run back into the channel? Said objection being sustained upon the ground that the question was immaterial, irrelevant and incompetent, and to which question said witness would have testified that the bulkhead upon the property of the Standard Oil Company was the only bulk-

head behind which said dredging material could be placed. (Assignment of Error No. V.)

The importance of this testimony sought to be adduced is manifest when the opinion of the Court with relation to the deposit of the dredge material is read. (Tr. page 66). The reasonable inference to be drawn from the opinion of the learned Trial Judge is that the contract was let and the dredging done, not for the purpose of improving the navigable channel, but to enhance the value of the holdings of the Standard Oil Company by deposit of the dredge material thereon. In that regard the Court, in its opinion, says:

“And yet that is what is being done under the arrangement by which the work in this instance is being carried out—the soil of plaintiffs being taken and deposited on the land of the Standard Oil Company for the betterment of the latter.” (Tr. page 66.)

This inference could not have been reasonably drawn from the evidence, had the Witness Aine been permitted to testify that the bulkhead on the property of the Standard Oil Company, behind which the dredged material was placed, was the only bulkhead available for that purpose, and that in order to comply with the requirements of the War Department of the United States, it was necessary to place the dredged material upon the lands of the Standard Oil Company.

We submit that in view of the fact that the Court admitted the contract of the Standard Oil

Company with the City of Richmond, that we should have been permitted to show why such a contract was made.

It is axiomatic that the growth and welfare of any community is largely dependent upon its commercial facilities and that it is the duty of the Courts, wherever possible, to aid in securing to the public all possible transportation facilities, and that no body of water which is navigable in any sense should be closed as an avenue of transportation.

We, therefore, respectfully submit that both the law and the evidence show the waterway in question to be a navigable body of water which the public authorities have the right to improve, and accordingly the decision of the Trial Court should be reversed.

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